(1)

Supreme Court, U.S.
FILED

991789 MAY 10 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

DIEGO ALFARACHE,

Petitioner,

v.

RICHARD CRAVENER, District Director US INS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

SIMON M. AZAR-FARR
Counsel of Record
SIMON AZAR-FARR & ASSOC., P.C.
2313 North Flores
San Antonio, TX 78212
(210) 736-4122 Telephone
(210) 736-4143 Facsimile
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

48 pp

QUESTIONS PRESENTED

1. Whether the Attorney General erred as a matter of law in *Matter of Soriano*, Interim Decision #3289 (BIA 1996, AG 1997), in applying § 440(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ("AEDPA"), retroactively in order to bar Mr. Alfarache relief from deportation under § 212(c) of the Immigration and Nationality Act, as amended, ("INA"), 8 U.S.C. § 1182(c).

2. Whether the retroactive denial of the opportunity to seek relief under INA § 212(c) to Mr. Alfarache violates the Due Process Clause of the Constitution.

3. Whether the disparate rulings from the various federal circuit courts violates Petitioner's right to equal protection of the law.

LIST OF PARTIES

Petitioner, Appellant below, is Mr. Diego Alfarache.

Respondents, Appellees below, are Mr. Richard Cravener, District Director of the United States Immigration and Naturalization Service in his official capacity and the Immigration and Naturalization Service, as an agency of the federal government.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

PETITION FOR WRIT OF CERTIORARI..... 1

OPINION BELOW..... 1

JURISDICTION..... 1

STATEMENT OF THE CASE..... 2

A. Statement Of Facts 2

B. Statement Of Jurisdiction Of The Court Of First Instance 5

REASONS FOR GRANTING THE PETITION..... 6

A. Unlawful Retroactive Application Of The AEDPA § 440(d) 6

1. Normal rules of statutory construction establish that Congress did not intend that AEDPA § 440(d) be applied in cases where the conduct or events triggering the subsection's provisions pre-dated AEDPA.... 9

2. Congress plainly expressed its decision not to make AEDPA § 440(d) applicable to pre-AEDPA conduct or events and that Congressional intent must govern..... 11

a. Plain language..... 11

b. Legislative History..... 12

TABLE OF CONTENTS – Continued

Page

3. If any doubt exists as to whether Congress had plainly expressed its decision not to make AEDPA § 440(d) applicable to pre-AEDPA conduct or events, such doubt must be evaluated under the longstanding rule of construing any lingering ambiguities in deportation statutes in favor of the alien 14

4. Even were it decided that Congress did not provide that AEDPA § 440(d) is inapplicable in cases where the triggering conduct or events pre-dated AEDPA, the judicial default rules enunciated by the Supreme Court in *Landgraf* require that § 440(d) not be applied to Petitioner..... 15

   a. AEDPA § 440(d) has retroactive effect and therefore implicates the *Landgraf* presumption against retroactivity..... 16

   b. The Attorney General's arguments against application of the *Landgraf* presumption against retroactivity have no merit..... 17

   c. The Attorney General's opinion in *Matter of Soriano* is not entitled to any special deference..... 18

5. The Attorney General's retroactive application of AEDPA § 440(d) in cases where the triggering conduct or events pre-dated AEDPA violates due process requirements by imposing retroactivity of a statute without any rational basis 19

TABLE OF CONTENTS – Continued

Page

B. Petitioner's Case Involves An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By The Supreme Court; The Various Federal Circuits Have Reached Conflicting Results On The Issue Presented In This Case, And The Fifth Circuit's Decision In This Case Does Not Conform With *Landgraf*..... 20

1. An alien may plead guilty to a deportable offense for a variety of reasons after considering all possible consequences of the plea, including reliance on availability of relief from deportation..... 21

2. Cut-off dates set by the agency are arbitrary, and the reliance interests of the aliens involved are the key factor in determining whether § 440(d) should be retroactively applied..... 22

C. Violation Of The Equal Protection Clause.... 25

1. Mr. Alfarache's right to equal protection has been violated because there is no rational basis for distinguishing between excludable and deportable aliens..... 25

2. Mr. Alfarache's right to equal protection is violated because the different federal circuits apply § 440(d) of AEDPA differently; Depending within which federal circuit an alien resides, such an alien may or may not be eligible for relief under § 212(c), thereby creating lack of uniformity in the application of this country's immigration laws .. 27

TABLE OF CONTENTS – Continued

Page

a. Different Circuit Courts have applied the principles of *Landgraf* with different results 27

b. Since the Circuit Courts are applying the statutes differently, guidance from the Supreme Court is warranted 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Akins v. Federal Election Commission, 101 F.3d 731 (D.C. Cir. 1996) (en banc) 18

Alanis-Bustamante v. Reno, 201 F.3d 1303 (11th Cir. 2000) 21, 22

Alfarache v. Cravener, 203 F.3d 381 (5th Cir. 2000) (No. 99-20437) 1, 21

Bowen v. Georgetown University Hospital, 488 U.S. 233 (1992) 19

Central Bank v. First Interstate Bank, 511 U.S. 164 (1994) 12

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) 18

Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) 14

Francis v. INS, 532 F.2d 268 (2d Cir. 1976) 6, 25, 26

Ghassan v. INS, 972 F.2d 631 (5th Cir. 1992) 6, 25

Goncalves v. Reno, 114 F.3d 110 (1st Cir. 1998) ... 27, 28

Grodzki v. Reno, 950 F. Supp. 339 (N.D. Ga. 1996) 17

Henderson v. INS et al., 157 F.3d 106 (2d Cir. 1998) 29

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 14

Kessler v. Strecker, 307 U.S. 22 (1939) 15

LaGuerre v. Reno, 164 F.3d 1035 (7th Cir. 1998) 23

Landgraf v. USI Film Prod., 511 U.S. 244 (1994) .... *passim*

Lindh v. Murphy, 117 S.Ct. 2059 (1997) 10, 15

Magana-Pizano v. INS, 200 F.3d 603 (9th Cir. 1999) 28

TABLE OF AUTHORITIES – Continued

Page

Majico v. Reno and Navas v. Reno, 970 F. Supp. 130 (E.D.N.Y. July 11, 1997) 8, 27, 28

Matter of Fuentes-Campos, Interim Decision #3318 (BIA May 14, 1997) 26

Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978) 7

Matter of St. John, Interim Decision #3295 (BIA 1996) 14

Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976) 6, 26

Matter of Soriano, Interim Decision #3289 (BIA 1996, AG 1997) 8, 17, 18, 27

Mayers v. U.S. Dept. of INS, 175 F.3d 1289 (11th Cir. 1999) 29

Montero v. Cobb, 937 F. Supp. 88 (D. Mass. 1996) 17

Morales-Ramirez v. Reno, 2000 WL 375430 (7th Cir. Ill.) (not yet reported in F.3d) 22

Pak v. Reno, 196 F.3d 666 (6th Cir. 1999) 29

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 19

Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999) 29

Shah v. Reno, 184 F.3d 719 (8th Cir. 1999) 29

Touche Ross & Co. v. Redington, 442 U.S. 560 (1970) 12

Turkhan v. Perryman, 188 F.3d 814 (7th Cir. 1999) 12, 24

Wallace v. Reno, 194 F.3d 279 (1st Cir. 1999) 21, 22, 24, 29

Yesil v. Reno, 157 F.3d 106 (2d Cir. 1998) 27

TABLE OF AUTHORITIES – Continued

Page

STATUTORY PROVISIONS

8 U.S.C. § 1101(a)(43) 4

8 U.S.C. § 1182(c) 4, 6, 7, 25

18 U.S.C. § 16 2

18 U.S.C. § 924(c) 2

18 U.S.C. § 1956 2

18 U.S.C. § 1962(d) 2

28 U.S.C. § 2241 6

28 U.S.C. § 1254 1

Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ..... *passim*

Section 309(c)(4) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Div. C., Department of Defense Appropriations Act, Pub. L. 104-208, (Sept. 30, 1996), 110 Stat. 3009 (as amended by Pub. L. 104-302, § 2 (Oct. 11, 1996), 110 Stat. 3656) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioner, Mr. Diego Alfarache, by and through his attorneys, Simon Azar-Farr & Associates, P.C., respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on February 22, 2000.

OPINION BELOW

In a reported opinion dated February 22, 2000, the United States Court of Appeals for the Fifth Circuit denied Mr. Alfarache's appeal. *Alfarache v. Cravener*, 203 F.3d 381 (5th Cir. 2000) (No. 99-20437). The Fifth Circuit ruled that the district court did have jurisdiction under the transitional rules to consider Mr. Alfarache's claims. But on the merits, the Fifth Circuit affirmed the district court's ruling dismissing Petitioner's claims.

JURISDICTION

The judgment and opinion of the court of appeals was entered on February 22, 2000. This petition is filed within 90 days of that entry of judgment, pursuant to Sup. Ct. R. 13.1. The Supreme Court has jurisdiction under Title 28 U.S.C. § 1254, which states that "cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF THE CASE

A. Statement Of Facts

Diego Alfarache is a native and citizen of Mexico, who entered the United States lawfully as an A-2 non-immigrant on or about 1974 at the tender age of six. He grew up in Houston, Texas, and moved to Austin, Texas in 1986 to attend the University of Texas. He adjusted status to that of a lawful permanent resident on December 7, 1990.

On August 19, 1994, Mr. Alfarache was convicted of "Conspiracy to Participate in a Racketeering Enterprise" under Title 18, § 1962(d) of the U.S. Code. He was sentenced to imprisonment for 48 months but he was released after serving only 42 months.

At the time of his conviction, Mr. Alfarache was not considered as one convicted of an "aggravated felony" under the provisions of the Immigration and Nationality Act. The category of "aggravated felony" created by the Anti-Drug Abuse Act of 1988, as a new ground of deportability for certain enumerated criminal offenses, originally only included (i) murder; (ii) any drug trafficking crime as defined in § 924(c) of Title 18, or Section 102 of the Controlled Substances Act, and (iii) any illicit trafficking in firearms or destructive devices as defined in § 921 of Title 18 of the U.S.C.

Then, the Immigration and Nationality Act of 1990 (IMMACT) expanded the definition to include money laundering under 18 U.S.C. § 1956; any crime of violence as defined under 18 U.S.C. § 16 for which the term of imprisonment imposed is at least five years; and any attempt or conspiracy to commit these acts. IMMACT

provided that these definitions apply to offenses committed on or after November 29, 1990.

The Immigration and Nationality Technical Corrections Act (INTCA) of 1994 further broadened the definition of aggravated felony to include, among others, certain offenses relating to the RICO Act (Racketeer Influenced and Corrupt Organizations Act). The expanded definition was expressly made to apply only to convictions entered on or after the INTCA's enactment date of October 25, 1994.

Mr. Alfarache's conviction was entered before October 25, 1994. Neither at the time it was entered nor at the time of the commission of the offense, did Mr. Alfarache's conviction satisfy the definition of one convicted of an "aggravated felony".

Since his release, Mr. Alfarache's conduct has been faultless. Currently, he works as a computer programmer for a software company in Austin. Because of his exemplary behavior, and for being a "minor player" in the conspiracy, the Government approached him in 1996 to be a material witness against Samuel Posada Rios, the kingpin of an international drug organization operating between Medellin, Columbia and Houston. This organization is "the most violent organization that has operated in Houston," according to the FBI special agent who investigated the case and testified in Mr. Alfarache's behalf in the proceedings before the immigration court. It is responsible for at least twenty homicides, so far as the government is aware, some of which involved members of the organization itself. At least one high-ranking member of the organization is reputed to be a member of the Mexican federal police. The Government prosecutors wrote a letter to the immigration court stating that the

organization Mr. Alfarache testified against is documented to be violent and retaliatory, and that Mr. Alfarache's testimony was highlighted in a front page article of the Metropolitan section of the Houston Chronicle. The Government asked that Mr. Alfarache not be deported for at least a year.

Mr. Alfarache was placed in deportation proceedings on or about September 26, 1995, when the Immigration and Naturalization Service issued an Order to Show Cause why he should not be deported. During the pendency of the deportation proceedings, the Immigration and Nationality Act (the Act) was amended twice: On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) was enacted, and on September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) was enacted. These changes to the INA altered Mr. Alfarache's situation after the fact and resulted not only in his deportability but also denial of relief from deportation – issues that are discussed at length below.

The immigration judge ruled that Mr. Alfarache was subject to deportation for having been convicted of a violation of any law or regulation relating to a controlled substance, and for having been convicted of an aggravated felony as defined under § 1101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), even though the Order to Show Cause failed to state what subparagraph of § 1101(a)(43) was violated. Other charges in the Order to Show Cause were not sustained.

Further, Mr. Alfarache's request for relief from deportation under § 212(c) [8 U.S.C. § 1182(c)] of the Act, filed on March 26, 1998, was denied on the ground of statutory ineligibility, and his application for withholding of

deportation was also similarly denied. The immigration judge ruled that, under the amendments brought about by the AEDPA and the IIRAIRA, Mr. Alfarache was deemed to have been convicted of an aggravated felony regardless of the date of the conviction, and he was denied any further relief.

Mr. Alfarache's timely appeal to the Board of Immigration Appeals was dismissed in its decision dated January 4, 1999, which stated that § 321 of IIRAIRA expanded the scope of the definition of an aggravated felony to apply regardless of whether the conviction was entered before, on or after the enactment of IIRAIRA, that § 440(d) of the AEDPA rendered Mr. Alfarache statutorily ineligible for consideration of 212(c) relief from deportation, and that as one convicted of an "aggravated felony" under the expanded definition, Mr. Alfarache was also deemed to have been convicted of a "particularly serious crime" and thus ineligible for withholding of deportation.

On January 26, 1999, Mr. Alfarache filed a petition for habeas corpus before the United States District Court for the Southern District of Texas. The District Court granted the Government's motion for summary judgment, and in accordance therewith, dismissed Mr. Alfarache's petition on April 26, 1999. On May 4, 1999, Mr. Alfarache timely filed his Notice of Appeal with the United States Court of Appeals for the Fifth Circuit. In a reported decision dated February 22, 2000, the Fifth Circuit denied Mr. Alfarache's appeal. This timely petition then followed.

B. Statement Of Jurisdiction Of The Court Of First Instance

Petitioner, Mr. Alfarache, filed an application for a writ of habeas corpus with the United States District

Court for the Southern District of Texas which had jurisdiction under Title 28 U.S.C. § 2241. The United States Court of Appeals for the Fifth Circuit exercised jurisdiction under Title 28 U.S.C. § 2241 and the not-codified § 309(c)(4) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Div. C., Department of Defense Appropriations Act, Pub. L. 104-208, (Sept. 30, 1996), 110 Stat. 3009 (as amended by Pub. L. 104-302, § 2 (Oct. 11, 1996), 110 Stat. 3656).

REASONS FOR GRANTING THE PETITION

A. Unlawful Retroactive Application Of The AEDPA § 440(d)

Lawful permanent residents convicted of a crime making them deportable have long had the right to seek a waiver of deportation under § 212(c) of the Act, 8 U.S.C. § 1182(c), so long as they had a "lawful unrelinquished domicile of seven consecutive years in the United States." 8 U.S.C. § 1182(c) (added by Immigration and Nationality Act of 1952).[1] A lawful permanent resident of the United States, like Mr. Alfarache, convicted of a crime triggering deportability could thus be assured that, even if he pled guilty or was otherwise convicted in criminal proceedings, a waiver of deportation could be sought in subsequent deportation proceedings before an immigration

---

[1] See also *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (holding that § 1182(c) relief is available in deportation as well as in exclusion proceedings); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976) adopting and applying *Francis'* holding nationwide); and *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992).

judge.[2] Given the significant time that Mr. Alfarache has spent in the United States, the early age that his residence began, and his investment in education and community life in the United States, Mr. Alfarache had concluded at the time of his plea and conviction that he was not only statutorily eligible for – but also would likely be granted relief from – deportation under § 212(c). Indeed, even at the time of the institution of the deportation proceedings, Mr. Alfarache was eligible for relief under § 212(c).

Congress enacted AEDPA on April 24, 1996. Subsection 440(d) of AEDPA provided that relief under § 1182(c) was no longer available to any alien who "is deportable by reason of having committed any criminal offense covered in" INA §§ 241(a)(2)(A)(iii) [aggravated felonies] and 241(a)(2)(B)(i) [controlled substance offense]. Mr. Alfarache was found deportable pursuant to these provisions.

Congress did not designate AEDPA § 440(d) as one of the sections that "shall apply" in cases triggered by pre-AEDPA conduct or events. Indeed, it removed language calling for § 440(d)'s retroactive application that had been included in the original Senate version of the legislation.

---

[2] Among the favorable factors considered by an Immigration Judge under S 212(c) are family ties within the United States; residence of long duration in this country (particularly when the inception of residence occurred at a young age); evidence of hardship to the individual and family if deportation were to occur; service in this country's armed forces; a history of employment; existence of property or business ties; evidence of value and service to the community; proof of genuine rehabilitation; and other evidence attesting to an individual's good character. See generally *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978).

Nevertheless, immediately after AEDPA's enactment, the INS began urging that § 440(d) should be applied in *all* pending and subsequently initiated deportation cases, regardless of whether the conduct or events triggering the § 440(d) restrictions pre-dated the date of enactment of AEDPA. Two months after AEDPA's enactment, the INS' position was rejected by the Board in *Matter of Soriano*, Interim Decision #3289 (BIA June 27, 1996). In that decision, the Board held that § 440(d) may not be applied retroactively to a lawful permanent resident who applied for § 212(c) relief before AEDPA's enactment on April 24, 1996. *Id.*

The INS sought review of the Board's decision by the Attorney General. Without first hearing from the opposing party or the *amici* who had appeared before the Board, the Attorney General summarily vacated the Board's decision on September 12, 1996. See *Majico v. Reno* and *Navas v. Reno*, 970 F. Supp. 130 at 144 (E.D.N.Y. July 11, 1997).

Five months later, the Attorney General issued a written opinion in *Matter of Soriano*, Interim Decision #3289 (A.G. 1997). The Attorney General concluded that AEDPA § 440(d) should be applied retroactively to all § 212(c) waiver cases even in cases where § 440(d) was triggered by events prior to the date of enactment of AEDPA. Finding that "nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending proceedings, or that it is not to be," the Attorney General declined to apply the traditional presumption against retroactive application of statutes. The Attorney General stated that application of § 440(d) in cases based on pre-AEDPA criminal conduct or convictions does not have retroactive effect. Thus,

under the Attorney General's position, lawful permanent residents, many with relatively minor convictions, are now subject to automatic deportation even if the triggering conduct and conviction took place years or decades ago.

Mr. Alfarache is an example of a lawful permanent resident of the United States who, under the Attorney General's view, is now barred from seeking relief from deportation based on conduct and a conviction predating AEDPA. Had he had the opportunity to apply for a waiver, his application for relief would most likely have been granted as a matter of discretion. He has substantial ties to this country, but he was never given the opportunity to present his ties to this country to an immigration judge. In the succeeding pages, Mr. Alfarache contends that § 440(d) of AEDPA may not be applied retroactively to conduct or events, in this case his conviction that pre-dated the date of enactment of AEDPA.

1. Normal rules of statutory construction establish that Congress did not intend that AEDPA § 440(d) be applied in cases where the conduct or events triggering the subsection's provisions pre-dated AEDPA.

In its 1994 decision in *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994), the Supreme Court explained the process for determining to which cases a new statute will apply. *Id.* at 263-80. "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. Only where Congress has not done so is there need to resort to *Landgraf's*

judicial default rules and apply the traditional presumption against retroactivity if a court determines that a statute would have retroactive effect. In short, "where the Congressional intent is clear, it governs." *Landgraf* at 264.[3] In *Lindh*, the Supreme Court said that such a reading of *Landgraf*, (which was adopted by the Attorney General in *Matter of Soriano*), "ignores context." *Id.* As the Court stated: "Although *Landgraf*'s default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case). . . . " *Id. Lindh* thus proceeded to consider the statutory language and context, as well as the legislative history, in order to determine Congress' intent concerning the temporal reach of a statute. Finding evidence of prospective intent, the Court found no need to resort to *Landgraf*'s judicial default rules. In contrast, in *Matter of Soriano*, the Attorney General engaged in no analysis of the text, structure, or legislative history of the Act before launching into an application of *Landgraf*'s judicial default rules.

---

[3] See also *Lindh v. Murphy*, 117 S.Ct. 2059, 2063 (1997) (rejecting the interpretation of *Landgraf* that "there are only two alternative sources of rules to determine [a statute's] ultimate temporal reach: either an 'express command' from Congress or application of our *Landgraf* default rule").

2. Congress plainly expressed its decision not to make AEDPA § 440(d) applicable to pre-AEDPA conduct or events and that Congressional intent must govern.

In the absence of any contrary effective date provision, § 440(d) of AEDPA came into effect on the date of enactment of the Act. That does not, however, answer the question of whether § 440(d) may be applied to pre-AEDPA conduct or events. As the Supreme Court observed, "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. Accordingly, in the absence of an express statutory provision clearly delineating the temporal reach of § 440(d) of AEDPA, this Court must proceed with an analysis of the plain language and legislative history of the statute to resolve the issue of retroactive application.

a. Plain language

The plain language of AEDPA's Title IV immigration provisions read as a whole, and against the backdrop of the decision in *Landgraf*, shows that Congress did not intend § 440(d) to apply retroactively. In *Landgraf*, after reviewing the ancient roots and history of the traditional presumption against retroactive legislation, the Court reaffirmed the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf*, 511 U.S. at 265. The Court concluded that "prospectivity remains the appropriate default rule." *Id.* at 272. A presumption against retroactivity "assured that Congress itself has

affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits," thereby "allocat[ing] to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." *Id.* at 272-73. The Court noted that this judicial default rule serves to "giv[e] legislators a predictable background rule against which to legislate." *Id.*

In sum, "[t]he fact that Congress chose to impose some forms of [retroactivity], but not others, indicates a deliberate congressional choice with which the courts should not interfere." See *Central Bank v. First Interstate Bank*, 511 U.S. 164, 184 (1994). "Obviously, then, when Congress wished to provide [for retroactive application], it knew how to do so and did so expressly." See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1970). Because Congress chose here not to provide for retroactive application for AEDPA § 440(d), the Attorney General was incorrect as a matter of law in applying it retroactively.

b. Legislative History

If the plain language of AEDPA's Title IV immigration provisions read as a whole were not enough to determine conclusively that § 440(d) is not applicable retroactively, the legislative history removes any doubt that this is the correct interpretation. That history shows that the original Senate version of the bill that became AEDPA contained language making § 440(d) applicable retroactively, but that this language was dropped after House-Senate Conference.

The restriction on § 212(c) relief that became § 440(d) of AEDPA had been introduced in Congress a year earlier

by Senators Dole and Hatch as part of a group of immigration provisions that they included in an amendment of their own proposed Senate bill S. 735, entitled the "Comprehensive Terrorism Prevention Act of 1995." See 141 Cong. Rec. S. 7553 (May 25, 1995 – Legislative Day of May 15, 1995). At that time, the section including the provision that later became AEDPA § 440(d) specified: "The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to cases pending *before, on, or after* such date of enactment." See 141 Cong. Rec. at S. 7559 (emphasis added by Petitioner). On June 7, 1995, the Senate adopted the provision and the language of retroactive applicability when it passed S. 735. See 141 Cong. Rec. at S. 7863 (June 7, 1995); 141 Cong. Rec. D. 691 (June 7, 1995).

The House meanwhile had adopted its own provision in H.R. 2703, the House's version of the legislation that later became AEDPA. The House bill limited § 212(c) relief in a less restrictive way and did not include language making the restriction applicable retroactively. See 142 Cong. Rec. at 2295 (March 14, 1996). When the House took up consideration of S. 735 on March 14, 1996, the House amended the Senate version by replacing the Senate text with the text of its own H.R. 2703. See 142 Cong. Rec. H. 2288. The House then asked for a conference with the Senate, insisting on the House amendments. *Id.* at H. 2304.

One month later, after the House-Senate conference, the Senate's restrictions on § 212(c) relief remained in the legislation coming out of the conference committee, but the language of retroactive application had been

dropped. See 142 Cong. Rec. H. 3323 (April 15, 1996).[4] The Senate's restriction on § 202(c) relief, without any accompanying language of retroactive applicability, then became § 440(d) of AEDPA, as passed by Congress and signed by the President on April 24, 1996.

3. If any doubt exists as to whether Congress had plainly expressed its decision not to make AEDPA § 440(d) applicable to pre-AEDPA conduct or events, such doubt must be evaluated under the longstanding rule of construing any lingering ambiguities in deportation statutes in favor of the alien.

The Supreme Court has repeatedly held that any ambiguities in immigration statutes must be read to avoid deportation consequences. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (referring to "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien").[5]

The Supreme Court has applied this principle to issues relating to the temporal reach of deportation legislation, finding that "[I]n the absence of a clear and definite expression, we are not at liberty to conclude that Congress intended that any alien, no matter how long a resident of this country, or however well disposed toward our Government, must be deported, if at any time in the

---

[4] See also Conference Committee Report, 142 Cong. Rec. H. 3333, 3335 (expressly adopting § 303(e) of the Senate bill containing limitations on § 1182(c) relief but not adopting § 303(f) containing the provision for retroactivity).

[5] The Board has recognized this rule. See *Matter of St. John*, Interim Decision #3295 (BIA 1996). *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (interpreting the statute in the "narrowest" possible way because deportation is a drastic consequence).

past, no matter when, or under what circumstances, or for what time, he was a member of the described organization." *Kessler v. Strecker*, 307 U.S. 22, 30 (1939) (interpreting the statute providing for deportability based on membership in a subversive organization). In short, this rule of statutory construction counsels that any lingering doubts regarding the temporal reach of § 440(d) of AEDPA should and must be resolved in favor of Mr. Alfarache.

4. Even were it decided that Congress did not provide that AEDPA § 440(d) is inapplicable in cases where the triggering conduct or events pre-dated AEDPA, the judicial default rules enunciated by the Supreme Court in *Landgraf* require that § 440(d) not be applied to Petitioner.

As noted earlier, the first step in determining to which cases a new statute will apply is to ascertain "whether Congress has expressly prescribed the statute's proper reach." See *Landgraf*, 511 U.S. at 280. If Congress has done so, as may be determined by normal rules of statutory construction, the analysis is over; "there is no need to resort to judicial default rules." *Id.*; see *Lindh v. Murphy*, 117 S.Ct. at 2062. For the reasons set forth earlier, that is the situation in this case. However, if this Court should reach a different conclusion, it must then consider the judicial default rules set forth by the Supreme Court in *Landgraf*.

a. AEDPA § 440(d) has retroactive effect and therefore implicates the *Landgraf* presumption against retroactivity.

Under *Landgraf*'s judicial default rules, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-70. If the court determines that the new law attaches such new legal consequences, i.e., has retroactive effect, then it applies the "traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment," *id.* at 278, and the new law is held inapplicable to such pre-AEDPA conduct unless a "clear congressional intent" to ordain such retroactive application appears. *Id.* at 280. Conversely, if the court determines that the new statute would have new legal consequences constituting "genuinely 'retroactive' effect," a presumption arises in favor of applying the statute to pre-AEDPA events; but this presumption may be overcome by a showing of " 'manifest injustice or [that] there is statutory direction or legislative history to the contrary.'" *Id.* at 277. "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270.

The Attorney General's interpretation of AEDPA § 440(d) as eliminating the right of individuals such as Mr. Alfarache to pursue § 212(c) relief based on past criminal conduct and convictions unmistakably "takes away" a right or "attaches a new disability" in respect to

past events.[6] Past conduct and convictions operate to eliminate a previously held right to apply and be considered for relief from deportation. Viewed another way, past conduct and convictions vitiate a defense to deportation. In this case, Mr. Alfarache pled guilty and agreed to the conviction on the belief that he would be able to assert a defense to deportation under § 212(c). As the Attorney General's decision in *Matter of Soriano* noted, "[a] successful applicant for relief under § 212(c) will not . . . be deported from the country, even though his or her past criminal convictions would otherwise lead to deportation." See *Matter of Soriano*, Interim Decision #3289 at 5.

b. The Attorney General's arguments against application of the *Landgraf* presumption against retroactivity have no merit.

There is no merit to the Attorney General's assertion that the *Landgraf* presumption against retroactivity has no applicability to these cases because a § 212(c) application should be viewed as a prospective injunction that is properly governed by the law in effect at the time the injunction is issued. See *Matter of Soriano*, at 5. The reality here is that AEDPA § 440(d) effects a drastic change in the law relating to the immigration consequences for Mr. Alfarache, a lawful permanent resident with considerable ties to this country. By taking away the substantive right to apply for a waiver of deportation, § 440(d) makes

---

[6] See, e.g., *Grodzki v. Reno*, 950 F. Supp. 339 (N.D. Ga. 1996) (conviction and release from prison occurred over 8 years before enactment of AEDPA); *Montero v. Cobb*, 937 F. Supp. 88 (D. Mass. 1996) (conviction and release from prison occurred over 12 years earlier).

deportation automatic for him. Clearly, the Attorney General's application of § 440(d) to pre-AEDPA conduct and convictions must be seen as retroactively affecting the calculus of risks and relevant rights connected with the conduct, or with the choices made during the past criminal proceedings, and thus must be seen as attaching a new and unfair legal consequence to such past conduct and choices.[7]

c. The Attorney General's opinion in *Matter of Soriano* is not entitled to any special deference.

The decision of the Attorney General in *Matter of Soriano* is not entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, the first question in interpreting a statute is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the answer is yes, there is no need to proceed to consider the agency's interpretation. *Id.* Where the agency's opinion is not based on statutory construction but rather on interpretation of judicial default rules, deference is wholly inappropriate. *Akins v. Federal Election Commission*, 101 F.3d 731 (D.C. Cir. 1996) (en banc) (rejecting *Chevron* deference for agency interpretation of Supreme Court construction of statute: "[a]gencies have no special qualifications or legitimacy in interpreting Court opinions"). In this case, the Attorney General has reached her own interpretation of

---

[7] Even were it determine that there is no retroactive effect, the evidence of "statutory direction" and legislative history arguing against retroactive application still overcomes any presumption in favor of applying AEDPA § 440(d) to pre-AEDPA events. *Landgraf*, 511 U.S. at 277.

what this Court's *Landgraf* default rules stand for. Her interpretation of those default rules and this Court's opinion in *Landgraf*, contrary to an interpretation of statute is entrusted to her, is not entitled to deference.

5. The Attorney General's retroactive application of AEDPA § 440(d) in cases where the triggering conduct or events pre-dated AEDPA violates due process requirements by imposing retroactivity of a statute without any rational basis.

The Supreme Court cautioned in *Landgraf* that the interest in avoiding the adjudication of constitutional questions also counsels against the retroactive application of a new statutory provision. *Landgraf*, 511 U.S. at 279 n.31. The Due Process Clause "protects the interest in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Id.* at 265. Like any piece of legislation, legislation with retroactive characteristics must meet the basic due process requirement of being "supported by a legitimate legislative purpose furthered by a rational means." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Legislation that operates retroactively must further be supported by an independent rationale for the ways in which the statute operates retroactively. *Id.* at 730. A purpose that supports a law's prospective characteristics is not sufficient. *Id.* Indeed, the constitutionality of retroactive legislation is "conditioned upon a rationality requirement beyond that applied to other legislation." See *Bowen v. Georgetown University Hospital*, 488 U.S. 233 (1992) (Scalia, J., concurring).

In this case, the statute read as a whole, demonstrates that Congress did not even intend retroactive application. In any event, Congress certainly offered no purpose for any intended retroactive application of AEDPA § 440(d). The prospective scheme created by AEDPA bears little relationship to the way the law works when applied retroactively. Applied prospectively, AEDPA serves to provide notice of the severe and certain deportation consequences that will flow from any of the crimes enumerated in § 440(d). When applied retroactively, the statute works instead to upset and frustrate settled expectations based on a justifiable reliance.

B. Petitioner's Case Involves An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By The Supreme Court; The Various Federal Circuits Have Reached Conflicting Results On The Issue Presented In This Case, And The Fifth Circuit's Decision In This Case Does Not Conform With *Landgraf*.

Mr. Alfarache's petition for writ of certiorari squarely falls into the reasons the Court uses for granting a writ of certiorari as explained in Supreme Court Rule 10(c), in that "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court." U.S.C. Supreme Ct. R. 10(c). The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law, that is, whether the retroactive application of a statute that denies the opportunity for discretionary relief from deportation violates the alien's right to due process. This issue has not been settled by the Supreme Court, but

should be, because several Circuit Courts have rendered conflicting opinions on the topic. The decision by the Fifth Circuit in Mr. Alfarache's appeal sets forth a belief that "'pre-AEDPA convictions can trigger AEDPA § 440(d),' at least when an application for INA § 212(c) relief was not pending on the date that AEDPA took effect." *Alfarache v. Cravener*, 203 F.3d 381 (5th Cir. 2000). In other words, it would appear the Fifth Circuit believes that AEDPA acts retroactively to deny relief under INA § 212(c) unless an application for such relief was already pending at the time AEDPA was enacted. Other Circuits, including the Seventh, have found the cut-off date to be arbitrary, and are more concerned with whether reliance on an opportunity for relief played into an alien's plea decision.

1. An alien may plead guilty to a deportable offense for a variety of reasons after considering all possible consequences of the plea, including reliance on availability of relief from deportation.

The issue of an alien's reliance is clearly explained by the Court of Appeals for the First Circuit in *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999). The First Circuit explained that "wherever an alien pled guilty prior to AEDPA, the alien might have relied on the availability of a waiver, and so the broadened AEDPA waiver ban should never apply in such a case." *Wallace* at 287. The Eleventh Circuit expressed identical sentiments with their decision in *Alanis-Bustamante v. Reno*, 201 F.3d 1303 (11th Cir. 2000). The Eleventh Circuit, agreeing with the First Circuit, stated that "the alien's perspective is the relevant one for determining when a proceeding commences for

purposes of deciding which statutory rules apply." *Alanis-Bustamante* at 1309. Quoting *Wallace*, the Eleventh Circuit Court said:

> "[W]e are not concerned with the INS's internal time tables, starting points, due dates, and the like but with the judicial question of retroactivity. This question turns on considerations unrelated to the purpose of INS regulations – primarily . . . with the evil Congress sought to prevent and the realities of reasonable reliance or settled expectations on the part of litigants." *Id.*

This is exactly the sentiment Mr. Alfarache asserts in this appeal. Mr. Alfarache contends that he considered all possible consequences when he entered his guilty plea. This is when reasonable reliance attached, and when his settled expectations were couched. If, for example, an offer for leniency was given in exchange for a guilty plea and additional testimony, then the party pleading guilty has acted based on that justifiable reliance and that reliance should be honored.

2. Cut-off dates set by the agency are arbitrary, and the reliance interests of the aliens involved are the key factor in determining whether § 440(d) should be retroactively applied.

The Seventh Circuit recently visited the issue of agency's arbitrary cut-off dates in *Morales-Ramirez v. Reno*, 2000 WL 375430 (7th Cir. Ill.) (not yet reported in F.3d). There, the Seventh Circuit agreed with the proposition that 440(d) should not be applied to "pending" proceedings, and that determination of whether proceedings were actually pending should be based on the reliance interests of aliens involved in the process. *See Morales-*

Ramirez at 5. The court reasoned that " . . . the relevant inquiry lay not in when proceedings actually commenced, but when the reliance interests of aliens should be considered for the purposes of determining whether § 440(d) should be retroactively applied." *Id.* AEDPA § 440(d) did not even exist when Mr. Alfarache committed his criminal offense. It also did not exist when Mr. Alfarache agreed to plead guilty. If § 440(d) were in effect, Mr. Alfarache could have considered the substantial consequences AEDPA added to his actions, and in particular the lack of any defense to deportation and he would have acted accordingly. Mr. Alfarache's substantial reliance came into being at the time he pled guilty and was convicted. He agreed to the plea in part upon the justifiable expectation that he had a defense to deportation under § 212(c) and that he would likely be granted relief from deportation.

The Seventh Circuit clarified the questions behind retroactive application of AEDPA through a hypothetical they posited in *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998). It hypothesized:

> "[s]uppose a person facing deportation conceded deportability in reliance on having a good shot at a waiver of deportability. In that event, to abolish such waiver for his class of deportees after he had relied by forgoing a challenge to deportability would pull the rug out from under him. And in that case we have held that the abolition would not apply to him . . . " *LaGuerre* at 1041.

Reiterating this belief in their decision in *Turkhan v. Perryman*, 188 F.3d 814 (7th Cir. 1999), the Seventh Circuit went on to say that "[t]he subsequent change in the law effected by AEDPA § 440(d), therefore, might turn a strategic

decision to forego a defense to deportability in favor of an application for discretionary relief into a mousetrap, leaving the alien with no judicial recourse." *Turkhan* at 827. The Seventh Circuit goes on the clarify that these considerations should apply to aliens seeking waiver of deportation under § 212(c) that had a colorable defense to deportability. *Id.* This is clearly the situation for Mr. Alfarache, as his application for relief pursuant to § 212(c) was denied without proper consideration because AEDPA eliminated this form of relief. Actual consideration of the 212(c) application will reveal that Mr. Alfarache did indeed have a "colorable defense" to deportability. The Seventh Circuit also gives the alternative, stating "if a criminal alien does not have at least a colorable defense to deportability, then he has lost nothing by conceding deportability and applying AEDPA § 440(d) retroactively to his pending application for a discretionary waiver of deportation under INA § 212(c) does not violate due process." *Turkhan* at 827. Under the circumstances of this case, the denial of an opportunity to seek a waiver of deportation under § 212(c) for Mr. Alfarache who undoubtedly had a colorable defense to deportation means that his right to due process of law has been violated.

In *Wallace*, the First Circuit stated their belief that their "decision leaves open the question whether and when AEDPA § 440(d)'s new ban on waivers applies to cases in which the alien pled guilty to the crime before AEDPA's enactment date but a deportation proceeding had not yet begun." *Wallace* at 287. Interestingly, the First Circuit states their hope that the question would be answered with "new guidance from the Supreme Court." *Id.*

C. Violation Of The Equal Protection Clause

Mr. Alfarache contends that the denial of his eligibility to seek relief under INA § 212(c), 8 U.S.C. § 1182(c), violates his right to equal protection of the law under the Constitution's Equal Protection Clause because the denial of relief to him treats similarly situated classes of aliens differently without a rational basis to a legitimate governmental interest. See *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), and its progeny including the Fifth Circuit's decision in *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992). The basis for Mr. Alfarache's contention lies in the difficult-to-justify truth that resident aliens in the various federal circuits are given different opportunities to apply for a waiver of deportation.

1. Mr. Alfarache's right to equal protection has been violated because there is no rational basis for distinguishing between excludable and deportable aliens.

The departure point for Mr. Alfarache's equal protection challenge is *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) and the Fifth Circuit's decision in *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992). Francis, convicted of criminal possession of marijuana, was charged with deportability under INA § 241(a)(11) (conviction for a drug-related offense). *Francis*, 532 F.2d at 269. He sought but was denied relief under INA § 212(c) by the Board on the ground that he was placed in deportation proceedings, and therefore was deportable rather than excludable. *Id.* at 270. Had he been placed in exclusion proceedings and charged with excludability for the same criminal conviction, Francis would have been statutorily eligible for relief under § 212(c). *Id.*

After reviewing the statutory and judicial history of § 212(c), the Second Circuit in *Francis* held that the Board's interpretation of INA § 212(c) violated the Constitution's Equal Protection Clause because it treated lawful permanent residents of this country who engage in comparable conduct differently based on whether the lawful permanent resident was in exclusion proceedings as opposed to deportation proceedings. Specifically, the Second Circuit held that the distinction set forth in INA § 212(c) between excludable and deportable classes of aliens, otherwise similarly situated, lacked any basis rationally related to a legitimate governmental interest, and, therefore, deprived aliens who were deportable for the same conduct as those who were excludable by the equal protection of the law. *Id.* at 272-73. Instead of striking down § 212(c) as unconstitutional, however, the Second Circuit remanded the case to the Board so that Francis could also be considered for relief under § 212(c). *Id.* at 273. On remand, the Board chose to adopt the decision of the Second Circuit on a nationwide basis. *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976).

In this case, Mr. Alfarache's right to equal protection of the laws was violated because of the Board of Immigration Appeals' decision in *Matter of Fuentes-Campos*, Interim Decision #3318 (BIA 1997), which Mr. Alfarache contends treats two similarly situated classes of aliens differently without a rational relation to a legitimate governmental interest.

2. Mr. Alfarache's right to equal protection is violated because the different federal circuits apply § 440(d) of AEDPA differently; Depending within which federal circuit an alien resides, such an alien may or may not be eligible for relief under § 212(c), thereby creating lack of uniformity in the application of this country's immigration laws.

a. Different Circuit Courts have applied the principles of *Landgraf* with different results.

In *Reno v. Goncalves*, the Supreme Court denied the government's petition for certiorari from the First Circuit's decision. 114 F.3d 110 (1998). Raul Percira Goncalves was convicted for his crimes prior to the enactment of AEDPA. He sought 212(c) waiver of deportation, but his application was dismissed based on the opinion of the Attorney General in *Matter of Soriano*, Interim Decision #3289 (BIA June 27, 1996). The First Circuit Court of Appeals held that the Attorney General's application of the new AEDPA restrictions took away a form of relief that, while discretionary, was plainly substantive, and so implicated the presumption against retroactivity set forth in *Landgraf*.[8]

The Second Circuit had occasion to address the issue of retroactively denying the opportunity for relief with cases that involved 212(c) applications filed subsequent to the enactment of AEDPA. In the joined cases of *Henderson v. INS*, No. 97-4050, *Majico v. Reno*, No. 97-2599, *Navas v. Reno*, No. 97-2600, and *Yesil v. Reno*, No. 97-2629, 157 F.3d 106 (1998), the Second Circuit also concluded that

---

[8] *Landgraf v. USI Film Products*, 511 U.S. 244, 266.

§ 440(d) of AEDPA is inapplicable to aliens in deportation proceedings prior to its enactment.

Henderson was a long-time permanent resident convicted of a controlled substance violation and charged with deportability under § 241(a)(2)(B)(i) of the Act under proceedings commenced in February 1994. Pending the outcome of his case, AEDPA was enacted and based on the *Soriano* opinion by the Attorney General, the Board reversed the waiver of deportation initially granted to him. Mojica was also a long-time permanent resident convicted prior to the enactment of AEDPA,[9] His application for 212(c) relief was also submitted after the enactment of AEDPA. The immigration judge found Mojica ineligible for relief and ordered him deported. On appeal, the Second Circuit held "like the First Circuit in *Goncalves v. Reno*, 144 F.3d at 126, we reject the Attorney General's position and hold that § 440(d) does not apply to cases initiated before the date of its enactment."

Courts in the Ninth Circuit have also expressed a willingness to apply the principles of *Landgraf* to prevent the retroactive application of AEDPA § 440(d), for example in their decision in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999). The Ninth Circuit stated their belief that "[t]he question of whether AEDPA applies to deportation proceedings pending at the time of enactment has mostly been settled by other circuits, who have concluded that it does not." *Magana-Pizano* at 610. They go on to make reference to cases from the First, Second, Third, Sixth,

---

[9] Mojica was convicted in 1988 for conspiracy to distribute cocaine, but did not make his 212(c) application until he was targeted for deportation in May of 1996.

Eighth and Eleventh Circuits.[10] In certain circumstances all of these circuits allow for 212(c) relief in spite of AEDPA. Unfortunately for Mr. Alfarache, the Fifth Circuit has not made the same interpretation of the same statute.

b. Since the Circuit Courts are applying the statutes differently, guidance from the Supreme Court is warranted.

The First, Second, Third, Sixth, Eighth, Ninth and Eleventh Circuits have all held that under certain circumstances, resident aliens in Mr. Alfarache's position can be granted discretionary relief from deportation under § 212(c). The Fifth Circuit, however, the Circuit within which Mr. Alfarache resides, does not allow for any form of relief under § 212 (c) for a person in Mr. Alfarache's position, because it has chosen to employ a different interpretation of the retroactive effect of AEDPA § 440(d). The fact of the matter is that Mr. Alfarache is not allowed to apply for discretionary relief from deportation simply because of where he lives in the United States, while if he simply lived elsewhere in this country, he would have had the opportunity to apply for discretionary relief under different interpretations of the same statutes by the other federal circuit courts. This disparate treatment of similarly situated aliens runs afoul of the right to equal protection of the law. The federal circuit courts have frequently visited the question of how § 440(d) affects

---

[10] See *Wallace v. Reno*, 194 F.3d 279, 287 (1st Cir. 1999); *Pak v. Reno*, 196 F.3d 666, 673-74 (6th Cir. 1999); *Mayers v. U.S. Dept. of INS*, 175 F.3d 1289, 1301-04 (11th Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225, 242 (3d Cir. 1999); *Henderson v. INS* et al., 157 F.3d 106, 129-30 (2d Cir. 1998); see also *Shah v. Reno*, 184 F.3d 719, 724 (8th Cir. 1999)

aliens like Mr. Alfarache, and what has resulted is confusing and unequal application of the statute. All are looking to the Supreme Court for guidance to eliminate confusion.

CONCLUSION

The Fifth Circuit's retroactive application of AEDPA § 440(d) impermissibly denies Mr. Alfarache the possibility of discretionary relief from deportation, and violates this Court's holding in *Landgraf* which directs against retroactive application. The Circuit Courts are at odds regarding the issue of how to apply AEDPA § 440(d) to people in Mr. Alfarache's position and the lack of uniformity among the Circuits runs afoul of Alfarache's right to equal protection of the law. For the foregoing reasons, Mr. Alfarache respectfully prays that this Court grant his petition for a writ of certiorari so that his eligibility for relief from deportation may be reviewed.

Dated: May 9, 2000, and

Respectfully submitted,

SIMON M. AZAR-FARR
SIMON AZAR-FARR & ASSOC., P.C.
2313 North Flores
San Antonio, Texas 78212
(210) 736-4122 Telephone
(210) 736-4143 Facsimile
Attorney for Petitioner-Plaintiff

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-20437

DIEGO ALFARACHE,

Petitioner-Appellant,

versus

RICHARD CRAVENER, District Director, Houston District, Immigration and Naturalization Service

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

(Filed Febr. 22, 2000)

Before GARWOOD, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:

The Immigration and Naturalization Service ("INS") brought deportation proceedings against Petitioner-Appellant Diego Alfarache, charging that he was subject to deportation for, *inter alia*, having been convicted of an aggravated felony and a controlled substance offense. The immigration judge ("IJ") ordered that Alfarache be deported and the Board of Immigration Appeals ("BIA") dismissed Alfarche's appeal. Alfarache then brought the

instant habeas corpus action under 28 U.S.C. § 2241, collaterally attacking the deportation order.

The INS argues that the district court erred when it exercised jurisdiction over Alfarache's habeas petition. Recently, in *Requena-Rodriguez v. Pasquarell,*[1] we considered the INS's arguments on this point. *Requena-Rodriguez* is factually indistinguishable from the instant proceeding in all material respects. In that case we concluded that "§ 2241 habeas jurisdiction remains in transitional cases where [8 U.S.C. 1 § 1252(g) does not apply,"[2] The INS concedes that this case is governed by the transitional rules and that 8 U.S.C. § 1252(g) does not apply. It necessarily follows from our *Requena-Rodriguez* decision, then, that the district court had jurisdiction over Alfarache's § 2241 habeas corpus petition, and we so hold.

On the merits, Alfarache makes four arguments. First, he contends that both the IJ and the BIA erred when they concluded that § 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA") – a provision that limits the Attorney General's discretion to grant relief from deportation pursuant to § 212(c) of the Immigration and Nationality Act ("INA") – applies to convictions (like his) that predated the enactment of EDPA. We considered and rejected the same argument in *Requena-Rodriques.*[3] There we held that "pre-AEDPA convictions can trigger AEDPA § 440(d)," at least when an application for INA

---

[1] 190 F.3d 299 (5th Cir. 1999).

[2] *Requena-Rodriquez v. Pasquarell,* 190 F.3d 299, 306 (5th Cir. 1999).

[3] 190 F.3d at 307-08.

§ 212(c) relief was not pending on the date that AEDPA took effect.[4] Alfarache filed his application for discretionary relief under INA § 212(c) after the effective date of AEDPA. In accordance with out decision in *Requena-Rodriquez*, we hold that AEDPA § 440(d) prohibits Alfarache's seeking discretionary relief from deportation under INA § 212(c).

Second, Alfarache argues that if AEDPA § 440(d) applies to prisoners who were convicted prior to the effective date of AEDPA (as we have held), then the statute violates his right to equal protection. AEDPA § 440(d) added a sentence to INA § 212(c) that prevents the attorney general from affording discretionary relief to aliens in deportation proceedings; the amendment does not apply, however, to aliens in exclusion proceedings. Alfarache argues that there is no rational basis on which to distinguish between aliens in deportation proceedings and those in exclusion proceedings. We considered and rejected the same argument in *Requena-Rodriquez*. There we explained that:

> Congress's more lenient treatment of excludable as distinct from deportable aliens . . . creates an incentive for deportable aliens to leave the country – which is after all the goal of deportation – without their having to be ordered to leave at the government's expense. To induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to

---

[4] *Id.* at 307.

> the country and by doing so trigger exclusion proceedings.[5]

In *Requena-Rodriquez* we concluded that this was a "facially legitimate and bona fide reason," and that it defeats the petitioner's equal protection argument.[6] It defeats Alfarache's equal protection argument for the same reason.

Third, Alfarache argues that applying AEDPA § 440(d) to preclude his ability to apply for INA § 212(c) discretionary relief violates his constitutional right to due process. He asserts that this is so because, if the INS had commenced deportation proceedings sooner or if his case had proceeded more expeditiously, then his application for discretionary relief might have been processed before AEDPA § 440(d) took effect.

Unlike a criminal defendant, an alien in deportation proceedings has no constitutional right to a speedy proceeding.[7] Furthermore, the relief to which Alfarache may have been entitled under INA § 212(c) "was couched in conditional and permissive terms. As a piece of legislative grace, it conveyed no rights, it conferred no status."[8] That being so, we hold that there has been no denial of Alfarache's right to due process.

---

[5] *Requena-Rodriquez*, 190 F.3d at 309 (*quoting* LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998)).

[6] *Id.*

[7] *See Doherty v. Thornburgh*, 943 F.2d 204, 209 (2d Cir. 1991); *Prito v. Gluch*, 913 F.2d 1159, 1161 (6th Cir. 1990).

[8] *Cadby v. Savoretti*, 256 F.2d 439, 443 (5th Cir 1958).

Fourth and finally, Alfarache argues that the BIA and the IJ erred when they concluded that he is deportable under INA § 241(a)(2)(A)(iii). This section provides that aliens who have committed "aggravated felonies" are deportable. Alfarache asserts that this section does not apply to him because the offense of which he was convicted, i.e., conspiracy to participate in a racketeering enterprise in violation of 18 U.S.C. § 1962(d), was not an "aggravated felony" as that term was defined in the version of INA § 101(a)(43) that was in effect at the time deportation proceedings were commenced against him.

After the INS initiated deportation proceedings against Alfarache, but before the IJ and the BIA had ruled on his case, the statutory definition of "aggravated felony" was expanded by AEDPA to include "an offense described in [18 U.S.C. § 1962] for which a sentence of one year imprisonment or more may be imposed."[9] AEDPA also inserted the following provision regarding retroactive application: "Notwithstanding any other provision of law (including effective date), the term ["aggravated felony"] applies regardless of whether the conviction was before, on, or after the date of enactment of this paragraph."[10]

Alfarache concedes that he committed such an offense; however, he argues that, because this language evidencing congressional intent that the provision apply retroactively appears in a definitional provision (INA § 101(a)(43)) rather than the provision assigning legal

---

[9] INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

[10] *Id.*

consequences to the definition (INA § 241(a)(2)(A)(iii)), Congress has not expressed its intent that the new definition apply retroactively with sufficient clarity to overcome the presumption against retroactivity. Like the other Courts of Appeals that have considered the question, we hold that the legal consequences that attach to the new definition apply retroactively.[11] The BIA and the IJ were thus correct in their conclusions that Alfarache had been convicted of an aggravated felony.

For the forgoing reasons the summary judgment granted by the district court is in all respects

AFFIRMED.

---

[11] *See Ortiz v. INS*, 179 F.3d 1148, 1155-56 (9th Cir. 1999); *Valderrama-Fonseca v. INS*, 116 F.3d 853, 856-57 (9th Cir. 1997); *Choeum v. INS*, 129 F.3d. 29, 36 (1st Cir. 1997). *Accord Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999). In his argument, Alfarache relies primarily on *Lettman v. Reno*, 168 F.3d 463 (11th Cir. 1999) *rehearing granted and opinion vacated in part* 185 F.3d 1216. Although the original opinion in that case did support Alfarache's argument, after Alfarache filed his brief, the Eleventh Circuit granted the government's petition for rehearing and vacated the decision relied on by Alfarache. *See id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DIEGO ALFARACHE, Petitioner,	§	CIVIL ACTION NO. H-99-0248
v.	§	
RICHARD CRAVENER, Respondent.	§	

ORDER

(Filed April 27, 1999)

Pending before the court is the Motion of respondent, the Immigration and Naturalization Service (INS) Houston District Director, for Summary Judgment (Docket Entry No. 3). Having carefully reviewed the motion and the opposition of petitioner, Diego Alfarache, the court is persuaded that the motion should be granted because none of petitioner's claims are meritorious. This court already rejected the same equal protection claim in *Olvera v. Reno*, 20 F.Supp.2d 1062, 1065 (S.D. Tex. 1998). The retroactive application of the definition of aggravated felony does not violate the equal protection clause because it is statutorily required by 8 U.S.C. § 1101(a)(43). *Cf. Moosa v. INS*, No. 96-60821, 1999 WL 181836 (5th Cir. Apr. 2, 1999); and *Martins v. INS*, 972 F.2d 657, 659-60 (5th Cir. 1992) (dealing with similar language making it clear that Congress intended amendments to be retroactive). Likewise, petitioner's argument concerning withholding of deportation provides him no basis for habeas relief. *See*

Martins v. INS, 972 F.2d at 660-62. Accordingly, respondent's Motion for Summary Judgment (Docket Entry No. 3) is **GRANTED.**

SIGNED at Houston, Texas, on this 26th day of April, 1999.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE